Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–1009 OF 2003 AND NO W–02–1013 OF 2003
GOPAL SRI RAM, HASHIM YUSOFF AND ZULKEFLI MAKINUDIN JJCA
12 JANUARY 2006

Company Law — Change of shareholders — Whether constituted change of identity of company — Whether new shareholders entitled to re-open transactions entered into by previous shareholders

Contract — Terms — Construction — Whether compensation formula in a contract a penalty or a debt — Contracts Act 1950 s 75

Equity — Equitable protection — Fiduciary duty — Voidable transaction — Affirming the whole transaction or avoiding the whole of it

Trusts and Trustees — Express trust — Declaration of trust — 'Future Contract' — Whether identifiable and thus valid and enforceable

On 20 November 1987, Syarikat Teratai KG Sdn Bhd ('STKG') signed a concession agreement with Dewan Bandaraya Kuala Lumpur ('DBKL') ('first concession agreement') to design, construct, finance and operate the privatisation of certain roads in the KL area. The material clause in the first concession agreement are inter alia the 'land rights' clause out of which arose the licensing agreement for signage rights in favour of STKG and later the present plaintiff. STKG's financial consultants proposed for STKG to be restructured to hive off all its non-concession businesses so that it became a one project company. Hence a restructuring was carried out by way of a sale agreement dated 31 March 1988 ('restructure sale agreement') entered into between the plaintiff and the defendant. Later, a supplemental sale agreement dated 12 September 1988 was also executed which provided for some further consideration for the restructure by way of sale. Other agreements were entered into between the plaintiff and the defendant with the approval of the shareholders. These included the signage agreement dated 2 November 1990 and the signage amending agreement dated 15 December 1990. The signage agreement by cl 8 provided for a compensation formula in the event the main concession agreement is terminated by either STKG or DBKL under rights given to each under the concession agreement. Clause 16 of the first concession agreement provided for a compensation scheme that recognized cancellation of operating contracts under it which included advertisement contracts. It did not however recognize the eventuality where STKG and DBKL mutually agree to terminate the first concession agreement. In that event the plaintiff would receive no compensation for loss of the advertising rights. Clause 8 was amended by the amending signage agreement of 15 December 1990 by providing for

the eventuality of mutual termination of the first concession agreement by STKG and DBKL. These agreements in particular clause 2.2 on advertising rights and cll 9.4 and 9.5 by which STKG undertook to hold on trust for the plaintiff any 'future contracts' entered into by it formed the subject matter of attack in the counterclaim.

Held, dismissing the defendant's appeal and allowing the plaintiff's appeal:

(1) (per **Gopal Sri Ram JCA**) Equitable protection such as that given to a beneficiary under a trust or a person to whom a fiduciary duty is owed gives the victim a right to either avoid or affirm an impugned transaction. In other words, from the standpoint of the victim, the transaction was voidable. It was not void. The right to avoid a transaction carried with it some limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it (paras 22 and 24).

(2) (per **Gopal Sri Ram JCA**) The contention that the present shareholders and directors of the defendant were taking a position different from the defendant's previous shareholders and directors and are therefore entitled to re-open the transactions entered into between the plaintiff and the defendant was without merit. It overlooked the proposition fundamental to company law, namely, that a company was a separate and distinct entity from its shareholders (paras 31).

(3) (per **Gopal Sri Ram JCA**) The learned judge addressed his mind to the unamended cl 8 when considering the plaintiff's claim. Also, he made a finding that the defendant had unilaterally terminated the first concession agreement. That was not quite correct. In any event, the defendant admitted that the first concession agreement was mutually terminated. This mutual termination triggered the amended cl 8 and the defendant accordingly became liable to the plaintiff to pay it compensation in accordance with the formula expressly agreed to by the parties (paras 40–41).

(4) (per **Gopal Sri Ram JCA**) The court did not think that the cl 8 formula was a penalty. To be a penalty, it must hold the other contracting party *in terrorem*. In other words, it must be extortionate. A clause in a contract for the sale and purchase of property that enabled the vendor to forfeit a non-extortionate deposit was not a penalty and did not come within s 75 of the Contracts Act 1950. There was nothing extortionate about the cl 8 formula. It was not directed at ensuring that the defendant performs its obligation under any contract it had with DBKL. It merely came into operation upon the happening of a contingency, namely, the mutual termination of the first concession agreement. That event did happen and as a result the formula had to be used to calculate the losses suffered by the plaintiff (paras 48–49).

(5) (per **Gopal Sri Ram JCA**) Clause 9.5 created an express trust. Once an express trust was created, there was no role for the law of contract. The real question or target that ought to have been addressed was whether the trust created under cl 9.5 was certain. After very careful consideration of the terms of the

restructure sale agreement, the conclusion was that the trust created under cl 9.5 was not void for uncertainty (see paras 59 and 66).

(6) (per **Zulkefli Makinudin JCA**) It was the court's finding that the signage right or advertising rights or licensing rights as variously called form part of the 'land rights' as defined in the first concession agreement. It is comprised in the definition of 'works' and forms part of the 'land rights' given in the said concession agreement (see para 82).

(7) (per **Zulkefli Makinudin JCA**) On the issue of the 'future contract' and the 'trust' point under the restructure sale agreement, all that was required to determine was whether the learned judge was correct in striking down cll 9.4 and 9.5 as being void for uncertainty. There was no ambiguity or uncertainty as to the meaning of 'future contract'. It was specifically defined in cl 1.1 of the restructure sale agreement to refer to projects or works 'other than such project or works. relating to the first concession agreement dated 20 November 1987'. It was clearly identifiable and thus valid and enforceable (see para 86).

[Bahasa Malaysia summary

Pada 20 November 1987, Syarikat Teratai KG Sdn Bhd ('STKG') telah menandatangani satu perjanjian Konsesi dengan Dewan Bandaraya Kuala Lumpur ('DBKL') ('perjanjian konsesi pertama') untuk mereka,membina, membiayai dan mengendalikan penswastaan jalaraya-jalanraya tertentu di kawasan Kuala Lumpur. Fasal utama dalam perjanjian konsesi pertama adalah, antara lain, fasal 'hak-hak tanah' yang man timbulnya perjanjian perlesenan untuk hak-hak tandatangan menyebelahi STKG dan kemudiannya plaintif sekarang ini. Pakar runding kewangan STKG mencadangkan supaya STKG distrukturkan semula untuk menghindarkan semua perniagaan bukan bersifat konsesinya agar ia menjadi syarikat dengan satu projek sahaja. Oleh itu satu penstrukturan semula telah dijalankan melalui satu perjanjian jualbeli bertarikh 31 Mac 1988 ('perjanjian jualan penstrukturan semula') yang dimasuki antara plaintif dan defendan. Berikutan itu, satu perjanjian jualan tambahan bertarikh 12 September 1988 juga telah dimasuki yang memperuntukkan balasan untuk penstrukturan semula tersebut melalui jualan. Perjanjian lain yang dimasuki antara plaintif dan defendan dengan kelulusan pemegang saham. Ini termasuklah perjanjian tandatangan bertarikh 2 November 1990 dan perjanjian tandatangan tambahan bertarikh 15 Disember 1990. Perjanjian tandatangan melalui fasal 8 memperuntukkan satu formula pampasan sekiranya perjanjian utama konsesi ditamatkan oleh STKG atau DBKL di bawah hak-hak yang diberikan kepada masing-masingnya di bawah perjanjian konsesi. Fasal 16 perjanjian konsesi pertama memperuntukkan satu skim pampasan yang mengenali pembatalan kontrak yang berkuat kuasa di bawahnya termasuklah kontrak-kontrak iklan. Namun ia tidak mengenali yang kemudian hari di mana STKG dan DBKL akan bersetuju untuk menamatkan perjanjian konsesi pertama sekiranya plaintif tidak menerima apa-apa pampas an untuk kehilangan hak-hak iklan. Fasal 8 telah dipinda oleh perjanjian tandatangan yang dipinda bertarikh 15 Disember 1990 dengan memperuntukkan kemungkinan penamatan bersama perjanjian konsesi pertama oleh STKG dan DBKL. Perjanjian-perjanjian tersebut khususnya fasal 2.2 berkaitan hak-hak iklan dan fasal-fasal 9.4 dan 9.5 di mana STKG mengaku janji untuk memegang amanah

bagi pihak plaintif apa-apa 'future contracts' yang dimasuki olehnya yang membentuk perkara pokok serangan dalam tuntutan balas tersebut. A

Diputuskan, menolak rayuan defendan dan membenarkan rayuan plaintif: B

(1) (oleh **Gopal Sri Ram HMR**) Perlindungan ekuiti sepertimana yang diberikan kepada benefisiari di bawah amanah atau seseorang yang mana kewajipan fidusiari itu diberikan memberikan mangsa satu hak untuk sama ada mengelakkan atau mengesahkan transaksi yang dipersoalkan. Dalam perkataan lain, daripada pandangan mangsa, transaksi itu boleh dibatalkan. Ia tidaklah terbatal. Hak untuk mengelakkan transaksi mempunyai beberapa batasan. Seseorang tidak boleh mengesahkan transaksi itu sebagai memberi faedah kepadanya dan memohon untuk mengelakkan bahagian itu yang merupakan beban. Ia suatu yang tidak boleh dipilih. Seseorang itu hendaklah sama ada mengesahkan keseluruhan transaksi atau mengelakkan keseluruhannya (lihat perenggan 22 dan 24). C D

(2) (oleh **Gopal Sri Ram HMR**) Hujah bahawa pemegang-pemegang saham dan pengarah-pengarah semasa defendan mengambil kedudukan berbeza daripada pemegang-pemegang saham dan pengarah-pengarah defendan sebelumnya memberi ruang kepada transaksi-transaksi yang dimasuki antara plaintif dan defendan itu tanpa merit. Ia terlepas perhatian terhadap hal penting dalam undang-undang syarikat, iaitu, bahawa sebuah syarikat adalah satu entiti yang berasingan dan berbeza daripada pemegang-pemegang sahamnya (lihat perenggan 31). E

(3) (oleh **Gopal Sri Ram HMR**) Hakim yang bijaksana telah mengutarakan pendapatnya kepada fasal 8 yang tidak dipinda apabila menimbangkan tuntutan plaintif. Bahkan, beliau telah membuat penemuan bahawa defendan telah menamatkan perjanjian konsesi pertama di satu pihak. Ini tidak betul. Dalam apa keadaanpun, defendan telah mengakui bahawa perjanjian konsesi pertama telah ditamatkan bersama. Penamatan bersama ini menyebabkan fasal 8 dipinda dan defendan sewajarnya bertanggungjawab kepada plaintif untuk membayarnya pampasan bersesuaian dengan formula yang nyata dipersetujui oleh pihak-pihak (lihat perenggan 40–41). F G

(4) (oleh **Gopal Sri Ram HMR**) Mahkamah tidak berpendapat bahawa formula fasal 8 adalah satu penalti. Untuk menjadikannya satu penalti, ia hendaklah memutuskan bahawa pihak yang mengkontrak itu in terrorem. Dalam perkataan lain, ia hendaklah melampau-lampau. Suatu fasal dalam kontrak untuk jualbeli harta yang membolehkan penjual merampas satu deposit yang tidak melampau bukan satu penalti dan tidak terangkum di bawah s 75 Akta Kontrak 1950. Tiada apa-apa yang melampau tentang formula fasal 8. Ia tidak diarahkan untuk memastikan bahawa defendan melaksanakan kewajipannya di bawah mana-mana kontrak ia telah masuki dengan DBKL. Ia hanya beroperasi selepas berlakunya satu kontingensi, iaitu, penamatan bersama perjanjian konsesi pertama itu. Kejadian itu telahpun berlaku dan akibatnya formula itu telah digunakan untuk mengira kerugian yang dialami oleh plaintif (lihat perenggan 48–49). H I

A

(5) (oleh **Gopal Sri Ram HMR**) Fasal 9.5 membentuk satu amanah nyata. Apabila suatu amanah nyata dibentuk, ia tidak mempunyai peranan apa-apa dalam undang-undang kontrak. Persoalan atau sasaran sebenar yang patut dikemukakan adalah sama ada amanah yang dibentuk di bawah fasal 9.5 suatu yang pasti. Setelah memberi pertimbangan teliti berhubung terma-terma penstrukturan semula perjanjian jualbeli, mahkamah membuat kesimpulan bahawa amanah yang dibentuk di bawah fasal 9.5 tidaklah terbatal kerana tidak pasti (lihat perenggan 59 dan 66).

B

(6) (oleh **Zulkefli Makinudin HMR**) Adalah penemuan hakim bahawa hak tandatangan atau hak iklan atau hak pelesenan sepertimana pelbagai cara ia dipanggil membentuk sebahagian daripada 'hak tanah' seperti yang ditafsirkan dalam perjanjian konsesi pertama. Ia meliputi tafsiran 'kerja-kerja' dan membentuk sebahagian daripada 'hak tanah' yang diberikan dalam perjanjian konsesi pertama itu (lihat perenggan 82).

C

(7) (oleh **Zulkefli Makinudin HMR**) Berhubung persoalan 'future contract'; dan 'amanah' di bawah penstrukturan semula perjanjian jualan itu, apa yang perlu ditentukan adalah sama ada hakim yang bijaksana adalah betul apabila membatalkan fasal-fasal 9.4 dan 9.5 sebagai terbatal kerana tidak pasti. Pada pendapat hakim, tidak ada ketaksaan atau ketidakpastian berhubung maksud 'future contract'. Ia secara spesifik mentafsirkan fasal 1.1. kepada perjanjian penstrukturan semula jualan untuk merujuk kepada projek-projek atau kerja-kerja 'other than such project or works relating to the first concession agreement dated 20 November 1987. Ia dengan jelas boleh dikenalpasti dan oleh itu adalah sah dan boleh dikuatkuasakan (lihat perenggan 86).]

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Notes

For cases on construction of terms, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4663–4671.

For cases on declaration of trust, see 12 *Mallal's Digest* (4t Ed, 2002 Reissue) paras 2066–2068.

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Cases referred to

Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165 (folld)

Coneco Ltd v Foxboro Great Britain Ltd [1992] (Unreported)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422 (refd)

H

Export Credits Guarantee Department v Universal Oil Products Co [1983] 2 All ER 205 (folld)

Goldcorp Exchange Ltd, In re [1995] 1 AC 74 (refd)

Hameeda Bee v Mrs P Seenivasagam [1950] MLJ 267 (refd)

Knight v Knight (1840) 49 ER 68 (refd)

I

Law Kam Loy v Boltex Sdn Bhd [2005] MLJU 225; [2005] 3 CLJ 355 (refd)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)

London Wine Co (Shippers) Ltd, In re [1986] PCC 121 (refd)

Mac-Jordan Construction Ltd v Brookmount Erostin Ltd [1992] BCLC 350 (refd)

Milroy v Lord (1862) 45 ER 1185 (folld)

PK Achuthan v State Bank of Travancore, Calicut AIR 1975 Ker 47 (folld)

Palmer v Simmonds (1854) 61 ER 704 (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors [2005] 2 MLJ 32 (folld)
Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378 (refd)
Subbarama Sastri v KS Raghavan AIR 1987 SC 1257 (refd)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711 (refd)
Tay Choo Wah v PP [1976] 2 MLJ 95 (refd)
Trytel, Re [1952] 2 TLR 52 (refd)
Verschures Creameries v Hull & Netherlands Steampship Co Ltd [1921] 2 KB 608 (refd)

Legislation referred to
Contracts Act 1950 ss 30, 74, 75
Penal Code ss 405, 405

Appeal from: Suit No D5–22–110 of 1995 (High Court, Kuala Lumpur)

Dato Dr Cyrus Das (Benjamin Dawson, Koh San Tee with him) (Noraisyah & Co) for the appellant.
Dato' Muhammad Shafee Abdullah (Kaushalya a/p Rajathurai, Jeffrey John with him) (Shahrizat Rashid & Lee) for the respondent.

Gopal Sri Ram JCA:

PRELIMINARY

[1] There are two appeals before us arising from the same suit. One is by the plaintiff; the other is by the defendant. The plaintiff complains that it was not awarded the sums it was justly entitled to. The defendant says that the plaintiff should have received nothing.

[2] The action is essentially one for breach of contract. But there is also an alternative claim by the plaintiff for the breach of an express trust. The defendant, apart from defending the action also mounted a counterclaim claiming a number of declarations which I will deal with at the appropriate place in this judgment.

[3] The action was originally tried by Steve Shim J (as he then was) before whom a substantial part of the case was completed. What remained of the action was tried before the learned trial judge against whose orders these appeals have been preferred. But nothing turns on this. For, it must be said at once in fairness to the trial judge who completed the trial that he correctly held that the case essentially depends on the construction of certain clauses in the contracts entered into between the parties and the interpretation of unchallenged facts and circumstances forming common ground between the disputants.

[4] There were, in broad terms, two issues before the learned judge. One in respect of liability; the other in respect of quantum. He resolved the first in the plaintiff's favour but refused to award the lump sum claimed by it. He also refused to make any award for future loss which the plaintiff claimed as being due to it as a matter of contract or alternatively under a trust. Having found liability in the plaintiff's favour, he dismissed the counterclaim. The plaintiff's appeal is directed upon the quantum issue whilst that of the defendant is against the issue of liability.

[5] To understand precisely why the parties at loggerheads it is necessary to tell the story that has brought about this litigation. Here it is.

FACTS AND BACKGROUND

[6] Dato' Fawziah is an enterprising businessperson. She formed two companies. They are the plaintiff and the defendant. But at that time the defendant was known as Syarikat Teratai KG Sdn Bhd, or STKG for short. That is the name you will find in the several documents in this case. Dato' Fawziah and her mother were the only two shareholders of these companies. In 1986, the City Hall of Kuala Lumpur or DBKL called for an open tender to design, construct, finance and operate the privatisation of certain roads in and around Kuala Lumpur. There were other bidders. But it was the defendant that succeeded in its bid. On 20 November 1987, the defendant entered into an agreement ('the first concession agreement ') with DBKL. Then on 31 January 1989, the defendant entered into a licence agreement with DBKL.

[7] A large sum of money was required to carry out the works. The defendant did not have it. Funds had therefore to be obtained from investors. A firm of professional financial consultants, called Schroder, was engaged to advise on the matter. They prepared an Information Memorandum meant for potential investors. That document contained, among other things, a proposal to restructure the defendant so as to divest it of all its non-concession businesses. This was important because no potential investor wants to buy into an ongoing business that may have problems. It makes better commercial sense to invest in an entirely new venture which is poised to start on a clean slate, as it were. The restructure was carried out by way of a sale agreement dated 31 March 1988 (which I find convenient to refer to as the restructure sale agreement) entered into between the plaintiff and the defendant. Later, a supplemental sale agreement dated 12 September 1988 was also executed which provided for some further consideration for the restructure by way of sale. These agreements, in particular certain clauses in the restructure sale agreement, formed the subject matter of attack in the counterclaim.

[8] In due course new shareholders subscribed for shares in the defendant. They were all reputable institutions of undoubted financial liquidity. They brought in the much needed capital; RM65m worth; to commence the project. Between them they acquired a preponderance of the defendant's issued and paid up share capital. Amongst them were American International Assurance Company Ltd, Bank Pembangunan Malaysia Bhd, Lembaga Urusan dan Tabung Haji and Mitsui Construction Co Ltd of Japan. All the shareholders of the restructured defendant

entered into an agreement dated 29 December 1988 under the terms of which control over the business and affairs of the defendant passed out of the hands of Dato' Fawziah and her mother and into the hands of the majority. Other agreements were entered into between the plaintiff and the defendant. These included the Signage Agreement dated 2 November 1990 and the Signage Amending Agreement dated 15 December 1990.

[9] The defendant successfully completed the projects undertaken by it. It spent monies on these which were partly from borrowings. In accordance with the first concession agreement it looked forward to recouping its capital expenditure through the collection of toll. Then something happened that was to have a far reaching and detrimental effect upon the plaintiff.

[10] In or about September 1990, there was a public demonstration at the toll booth established by the defendant along the Cheras highway protesting at the imposition of a toll. The Federal Government stepped in to deal with the situation. By its letter dated 12 September 1990, DBKL asked the defendant to suspend the collection of toll at the Cheras tollbooth. This spelled disaster for the defendant. In the first place, it was exposed to a loan repayment of RM40m which it had planned to pay from toll collection. In the second place, the whole of the shareholders funds amounting to RM65m would be wiped out. There then took place a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.

[11] It begins with the defendant's board asking Dato' Fawziah to discuss with DBKL and the Federal Government various options to have the matter resolved. One of these options was the payment of compensation to the defendant for termination of the first concession agreement and in accordance with its terms. The different solutions to the problem that had presented itself through no fault of the defendant were put to DBKL vide the defendant's letter dated 8 October 1990. DBKL in its letter of 20 October 1990 agreed in principle to take the option of terminating the first concession and paying compensation. But no figure was mentioned although the defendant had put forward an estimated sum of RM764.2m as compensation. An appeal to the then Minister of Finance, Tun Daim Zainuddin, fell on deaf ears. He simply told the defendant's then existing shareholders that the Federal Government was not in a position to pay the defendant any compensation.

[12] The next thing that happened was this. By letters dated 12 November 1990 and 24 November 1990 a company called UEM Bhd, a public limited company made an offer to purchase all the shares in the defendant company for a sum of RM97.5m. Curiously enough, neither letter made any mention of the proposed termination of the concession agreement by DBKL. In reality the shares were to be purchased by a company nominated by UEM. That company was Metro Juara Sdn Bhd which had merely two shareholders who were also its sole directors. These gentlemen were one Anuar Othman and one Dato Halim Saad. The defendant's shareholders could not resist the sale. Their predicament is reflected in a document called the Directors Briefing Note dated 13 December 1990. And it is not difficult to appreciate their dilemma. The whole idea of obtaining the tender was Dato'

Fawziah's brainchild. The other shareholders had invested large sums of money. The defendant had done all that was required of it under the first concession agreement. It had spent large sums of money to carry out its obligations. It now found itself with the ground cut from under its feet because of DBKL's termination of the first concession agreement. No compensation had been paid to the defendant as matters then stood although compensation was clearly payable. No one in his or her right mind will consider the choice of selling of their shares to Metro Juara at RM97.5m as a choice at all. All the independent evidence on record points to this being in reality a crude case of economic duress presenting itself in a more subtle form.

[13] Now, the offer by UEM to buy out the defendant's shares for RM97.5m simply does not make any commercial sense. Here you have a company that has just had its loan and shareholders capital wiped out in one stroke. It had no money in its coffers. It had huge debts. It had no prospects of receiving any compensation from DBKL. So why pay RM97.5m for the shares of such a company? The answer is simple enough. Anuar Othman and Dato Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin. The events leading to the takeover of the defendant company and subsequent thereto clearly bear this out. For example, look at the confident way in which Metro Juara behaved. Even before the restructure sale agreement was signed on 23 January 1991, Metro Juara wrote to DBKL on 14 January 1991 about recommencing toll collection and re-negotiating the first concession agreement. It would not have written such a letter unless everything had already been put in place.

[14] The next event that happened was the mechanics of the takeover of the defendant by Metro Juara. It was a rushed transaction. There was no examination of the defendant's books. No warranties were asked for or given. No due diligence exercise was ever carried out. An agreement called the share sale agreement dated 23 January 1991 was executed. Thereafter, the defendant's name was changed to Metramac Corporation Sdn Bhd, the name by which the defendant is now cited in the instant proceedings.

[15] Not long after the take over, a strange thing happened. Where doors were once closed to the defendant before its take over, as if by the utterance of a magic spell all bureaucratic doors were opened to the defendant after its takeover by Metro Juara. And, as if by the rub of a magic lamp, the Federal Government and DBKL who hitherto claimed to be impoverished suddenly found themselves flush with funds. They were now in a financial position to compensate the defendant. The figures are staggering. In one way or another, the defendant was to receive a total sum of RM756.7m. Let me give some details.

[16] In its letter of 30 August 1991, DBKL said that it would pay the defendant RM312m for the cost of works done. On 13 February 1992, the Federal Government in conjunction with DBKL agreed to subsidise the defendant with a sum of RM405m to enable the defendant to meet the cost of financing the works to be undertaken under a concession agreement that was to be entered into between DBKL and the defendant. Mark you, at this point in time, not a stick of work had been done

under the new concession agreement. On that very day, that is to say, 13 February 1992, two other events occurred. First, DBKL entered into another concession agreement with the defendant. I will refer to this as the second concession agreement. Second, the Ministry for Public Works gave the defendant an undertaking to pay it RM32.5m as 'payment for share premium' not 'previously taken into account': So far as this case is concerned, the words within quotation marks are meaningless. Because they have no nexus whatsoever to any of the agreements entered into between the several parties. You may well ask how all this could have happened without the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals — to profit them — instead of a wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

[17] For the sake of completeness, it must be mentioned that the RM32.5m mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was stupefying. He said that these two gentlemen had, as shareholders, paid this sum into the defendant's account and were now reimbursing themselves. This answer overlooks the most elementary principle of company law. It is this. The shareholders of a company have no interest, legal or equitable, in the assets of their company (see *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 255; [2005] 3 CLJ 355).

[18] In this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immoveable is a criminal breach of trust within s 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under s 409 (see *Public Prosecutor v Datuk Harun* [1977] 1 MLJ 180. I need do no more than quote from the judgment of Chua J in *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95 where his Lordship said:

> The sooner directors realise that *the Companies Act applies to private companies whether family or not* the better it is. *A company is not a mere puppet of the directors and the people interested in the proper and lawful conduct of the company are not just the directors and the shareholders.* All sorts of people have a legitimate and proper interest in the well-being and preservation of the assets and properties of a company, like creditors and persons having dealings with the company. (Emphasis added.)

I must therefore be forgiven if I were to look askance at learned counsel's rationale for what was done in this case.

[19] Returning to the mainstream, some time after the take over, the defendant purported to rescind the two signage agreements and to repudiate the restructure sale agreement. The plaintiff then commenced the action herein to recover monies it claims are lawfully due to it. The defence taken is manifold, and as I have already said, a counterclaim was mounted. Rather than go through the pleaded cases on either side, I gratefully adopt the approach taken by the learned trial judge in this case. And that is to deal with the specific issues raised on the joinder of the respective pleaded cases. I will first deal with the question of liability which really turns on the enforceability of the restructure sale and purchase agreement. And that is the first issue.

THE FIRST ISSUE: ENFORCEABILITY OF THE SALE AND PURCHASE AGREEMENT

[20] This issue brings into sharp focus the points taken in the defence and counterclaim. In respect of liability, all of them were decided against the defendant by the learned judge. The defendant complains that the judge was wrong. But I think that he was right. I will explain why.

[21] I begin with some observations about the defendant's pleaded case which has a few unusual features. In the first place, it complains of a breach of fiduciary duty by the plaintiff. Then it asks, in the counterclaim, for declarations that cll 2.2 and 9.5 of the restructure sale and purchase agreement are void. Now, when I first read that it seemed quite odd.

[22] Equitable protection such as that given to a beneficiary under a trust or a person to whom a fiduciary duty is owed gives the victim a right to either avoid or affirm an impugned transaction. In other words, from the standpoint of the victim, the transaction is voidable. It is not void. If authority is required to support such a well established proposition, I need only quote from Professor Waters' work, *Law of Trusts in Canada* (2nd Ed, 1984), at pp 718–720 where, when dealing with one mode of a breach of fiduciary duty, viz, the purchase by a trustee of trust property, he says:

> The general principle was established in the 17th century that a trustee may not purchase any part of the trust property. The rubric is clear and beyond argument … The purchase by a trustee of trust property, and *the same applies to all fiduciaries*, is not a void, but a voidable transaction. (Emphasis added.)

[23] The distinction between a voidable and a void transaction is that the former may be affirmed but the latter may not. It is axiomatic that a void transaction cannot be affirmed because there is nothing to affirm. Not all the ingenuity in the world can pour wine out of an empty bottle. So the declarations sought for are utterly useless and cannot, as a matter of law, be granted.

[24] In the second place, the right to avoid a transaction carries with it some limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must

either affirm the whole transaction or avoid the whole of it. There is no half-way house. Take the present instance. There are many clauses in the sale and purchase agreement. Some confer benefits on the defendant. Others may appear burdensome. Also there are several interlocking agreements entered into between the parties. Again, some may be beneficial and others burdensome. What the defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that.

[25] As for authority, let me first cite from two leading texts. *Halsbury's Laws of England* (4th Ed, Reissue) Vol 16 para 957 at p 844 states:

> On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:
>
> (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile; and
>
> (2) that he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.

[26] Next, *American Jurisprudence* (2nd Ed, 1966) Vol 28, pp 677–680 states as follows:

> Estoppel by the acceptance of benefits: Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.
>
> As a general principle, *one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.*
>
> This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience. (Emphasis added.)

[27] In *Verschures Creameries v Hull & Netherlands Steampship Co Ltd* [1921] 2 KB 608, Scrutton LJ said:

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

That is precisely what the defendant is seeking to do here.

[28] So, the defendant's case for avoiding parts of the restructure sale agreement and the Signage Agreement and the Signage Amending Agreement cannot succeed on grounds of pure principle. It is difficult to envisage a clearer case than this of a party taking inconsistent positions in respect of the same transaction.

[29] Now, the learned judge found against the defendant on the ground that there had been full disclosure to the defendant's board by the common directors of the plaintiff and the defendant of all material facts relevant to the agreements challenged by the counterclaim. The finding of the learned judge is based upon irrefragable evidence, including the company documents of the defendant where the disclosures are to be found. There is this further fact. The shareholders agreement expressly approved of the sale agreement of 31 March 1988 and declared it to be valid and binding on the defendant.

[30] There is another point. It has to do with the defendant's complaint that the signage agreement and the signage amending agreement are tainted because it was Dato' Fawziah and her mother who signed those documents on behalf of both the plaintiff and the defendant. Nothing could be further from the truth. These two agreements are dated 2 November 1990 and 15 December 1990. Bear in mind that the shareholders agreement had been signed on 29 December 1988. The independent investors being the majority shareholders had had control of the defendant's business and affairs for a period of about two years. So, there is no basis whatsoever for suggesting that the agreements of 2 November 1990 and 15 December 1990 were anything other than arms length transactions. If you look at the record of appeal carefully enough you will find other instances of such wild allegations being made by the defendant.

[31] The complaint of learned counsel for the defendant when closely examined amounts to this. The present shareholders and directors of the defendant are taking a position different from the defendant's previous shareholders and directors and are therefore entitled to re-open the transactions entered into between the plaintiff and the defendant. With respect, this contention is without merit for two reasons. First, it overlooks the proposition fundamental to company law, namely, that a company is a separate and distinct entity from its shareholders.

[32] In *Abdul Aziz bin Atan & Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165, all the shareholders of the defendant company in that case had sold their shares to a buyer. The company owned an estate in which the plaintiffs were employed. The question arose whether the sale of the shares had resulted in a sale of the estate. Shankar J said:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company. Authority for this proposition should be found in any textbook on law relating to companies (but see *Halsbury's Laws of England* (4th Ed) Vol 7 paras 1, 82 and 100.)
>
> In the present case there was no change whatsoever in the constitution of Ladang Rengo Malay Estate Sdn Bhd. The company did not change its identity or personality and it continued to own all the assets of the estate which were an integral part of the business for the purposes of which the applicant's were employed.

> But it is submitted for the applicants that for the purposes of reg 8 one should not look to the company but have regard to the change in the identity of the shareholders. In other words, it is being submitted that the business of Ladang Rengo Malay Estate Sdn Bhd. was not owned by the company but by the shareholders. This proposition violates the most elementary concept of company law. A single shareholder of a company only owns the shares in his name. He has no right to lay his hands on the assets of the company. In certain circumstances it is of course within the power of the shareholders to wind up a company and have the nett assets thereof, after satisfaction of all its liabilities, distributed to themselves. But until that happens property standing in the name of the company belongs to the company.

[33] So too here. The change in the shareholders of the defendant does not change its corporate identity. It is the same person it was when Dato' Fawziah and her mother were its sole shareholders. And it is the same person it was when the independent investors were its majority shareholders. It may have changed its name. It may have different shareholders. But it is still the same person.

[34] The second thing that is wrong with the defendant's argument is this. Assume for a moment that the defendant's present shareholders are mounting this challenge in the name of the defendant. Assume that they are entitled to do so — which is not the law. Even so, they must come to court with clean hands. But they do not. They are the ones who misappropriated the defendant's property — the RM32.5m. They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[35] Because this is a case in which the learned trial judge did not have the advantage of seeing and hearing the plaintiff's witnesses, I have taken greater care in examining his findings. I have very carefully scrutinised the disclosure documents. I have read them again and again. And I find myself entirely in agreement with the conclusions of the learned trial judge. This is a case in which the documentary evidence supports the finding made by the learned judge and I can find no reason to disagree with him on the issue of liability. That brings me to the second issue.

THE SECOND ISSUE: THE CLAUSE 8 CLAIM

[36] This issue arises out of the plaintiff's appeal. The complaint here is that the learned judge erred in directing damages to be assessed. It was submitted that he ought to have awarded the plaintiff RM65,182,920 by virtue of cl 8 of the signage agreement as amended by the signage amending agreement. Learned counsel for the plaintiff argued that the learned judge went wrong on this part of the case because he interpreted cl 8 in its original unamended form when he ought to have interpreted it as it stood after its amendment.

[37] Clause 8 of the signage agreement in its unamended form reads as follows:

8 CHARGES PAYABLE ON CANCELLATION OF CONTRACT

8.1 If the Concession agreement is terminated in any of the following circumstances:

(a) by the company pursuant to Clause 15.3 of the Concession agreement; or

(b) by the Datuk Bandar pursuant to Clause 15.4 of the Concession agreement,

then notwithstanding anything in Clause 1.4, this Agreement shall be cancelled automatically upon such termination becoming effective.

8.2 STKG acknowledges that the Licensee expects to receive revenue during each of the years commencing in 1 January, 1991 and ending on December, 2000 of M$ 7,797,000. It is agreed that upon cancellation under Clause 8.1 the Licensee shall be entitled to receive following:

(a) If cancellation occurs prior to 1 January, 1991, the following sums:

(i) RM7,797,000 in respect of 1991, and

(ii) The discounted value of RM7,797,000 in respect of each the years 1992 to 2000 applying discount rate of 8% annum

(b) If cancellation occurs on or after 1 January 1991, the following sums:

(i) RM$7,797,000 in respect the year in which cancellation occurs (the 'Relevant Year') less any amounts already received by the Licensee and payable to it in respect of that year; and

(ii) the discounted value of RM$7,797,000 in respect of each of the years from the Relevant Year to 2000 applying a discount rate of 8% per annum; and

(c) if cancellation occurs in 2000 RM$7,797,000 less any amounts already received by the Licensee or due to the Licensee and payable to it in respect of that year, together, in each case with interest at the rate of 9% per annum on the sum payable calculated from the date of cancellation to the date of payment by Datuk Bandar under the Concession agreement.

8.3(a) It is agreed that upon cancellation of this Agreement, a debt shall arise as calculated in accordance with Clause 8.2 and the debt shall be payable by STKG as a result of the cancellation of this Agreement PROVIDED THAT STKG shall only be obliged to make payment of the said debt due to out of moneys recovered from Datuk Bandar pursuant to the Concession agreement and the Licensee shall not take action to recover such debt from STKG expect if and to the extent that such moneys have been so recovered by STKG.

(b) To the extent that money recovered from Datuk Bandar pursuant to the Concession agreement or the Licence Agreement are clearly identifiable as payments in respect of cancellation of this Agreement STKG shall pay those sums to Licensee forthwith upon receipt.

(c) To the extent that moneys recovered from Datuk Bandar pursuant to the Concession agreement are clearly identifiable as payments in respect of cancellation of this Agreement then STKG shall pay to the Licensee a sum calculated in accordance with the following formula:

Payment:

$$\frac{R + C - (L + CI + T) \times CC}{TC}$$

where

R means the total compensation claim received from the Government;

C means the amounts of cash held by STKG (plus deposits);

L means the sum of all financial indebtedness to financial institutions;

CI means the sum of all current indebtedness of STKG, being moneys paid on a monthly or immediate basis, but not including claims for cancellation of contracts;

T means all tax payments, due or to become due;

TC means the value if all claims lodged by STKG against Datuk Bandar; and

CC means the value of claims under this Agreement.

[38] There are two important features in the unamended cl 8. First, it provides for the payment of compensation in the event of unilateral termination of the first concession agreement. There is no provision for the contingency of mutual termination. Second, sub-cl 8.3(a) identifies the money payable on cancellation of the first concession agreement as a debt due from the defendant to the plaintiff. And the formula for calculating that debt was expressly specified by the parties.

[39] I will not re-produce the amended cl 8 because, for present purposes, it is the same as the unamended version in all material respects save one. It makes the defendant liable to pay the plaintiff in the event of a mutual termination of the first concession agreement. And this is a critical difference as respects this part of the case.

[40] A reading of the judgment under appeal shows that the learned judge addressed his mind to the unamended cl 8 when considering the plaintiff's claim. He ought to have had regard to the amended cl 8. Also, he made a finding that the defendant had unilaterally terminated the first concession agreement. That is not quite correct because of recitals F and G of the second concession agreement which read as follows:

(F) The parties hereto have agreed that the First concession agreement and the Licence shall cease to have any force or effect and shall be replaced by this Concession agreement

(G) Metramac has agreed to the termination of the first concession agreement and its substitution by this concession agreement and will endeavour to obtain the consent of the lenders under the First concession agreement that, upon this Concession agreement coming into force, all their rights and claims thereunder shall be terminated and be null and void and have no further force and effect whatsoever.

[41] These recitals make it abundantly clear that the first concession agreement was terminated by mutual agreement between the defendant and DBKL. In any event,

A the defendant under para 24E of its pleaded case (at p 207 of the record of appeal) admits that the first concession agreement was mutually terminated. This mutual termination triggered the amended cl 8 and the defendant accordingly became liable to the plaintiff to pay it compensation in accordance with the formula expressly agreed to by the parties. It follows that the learned judge misdirected himself on the facts. It is understandable that he made the errors in question given the fact that he was picking up the threads fairly late into the case and given the voluminous documentary material he was required to peruse. But they are nevertheless very serious errors which have fatally flawed his decision and occasioned a miscarriage of justice.

C **[42]** The learned judge having correctly held that the defendant was liable to the plaintiff declined to apply the formula set out in the amended cl 8. He treated the case as one of ordinary breach of contract and regarded the formula under the clause as falling within s 75 of the Contracts Act 1950. On that finding he made an award for general damages and directed these to be assessed by the registrar of the court. The plaintiff has argued that the learned judge erred in making this order. The defendant supports the judge's approach. In this state of affairs it becomes necessary to examine s 75 which reads as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

F **[43]** The plaintiff's argument is that the crucial words in s 75 are 'when a contract has been broken". The section therefore only applies to contracts where the alleged contract breaker has refused to perform his obligation(s) under the particular contract. The section does not apply where there is no breach of contract. Here, there was no breach of contract because the defendant and DBKL mutually agreed to terminate the first concession. Hence the section does not apply.

G **[44]** With respect, I am unable to accede to this argument. In the context of both ss 74 and 75, the court is primarily concerned with identifying the contract that is broken. It is that very contract at which s 75 is addressed. Not some other contract. The point is quite simple. But it is central to the operation of s 75. Take this very case. The signage agreement (as amended) was not mutually terminated. And that is the contract for the breach of which the plaintiff is suing the defendant. It follows that at least prima facie s 75 may apply to the signage agreement as amended by the signage amending agreement. The first concession was mutually terminated. So, prima facie, s 75 does not apply to it. But that is not the contract on which the plaintiff is suing. Accordingly, in my view, plaintiff's counsel has addressed the wrong target. But I must mention that the line of argument I have adopted with regard to this part of the case was not advanced by those representing the defendant.

[45] In the context of the present case, two phrases in s 75 are important. First, the phrase 'if a sum is named in the contract as the amount to be paid in case of such

breach'. The second important phrase is 'if the contract contains any other stipulation by way of penalty'. If the amended cl 8 comes within either of these disjunctive phrases, then, s 75 would apply and the learned judge was right in directing an assessment of damages.

[46] The formula set out in the amended cl 8 is not 'a sum named in the contract'. It follows that s 75 does not bite on that count. Before I deal with the question whether the cl 8 formula is a stipulation by way of a penalty, I must say that my researches in this area of the law show that all the reported cases in Malaysia and India concern clauses in contracts which stipulate a forfeitable sum of money (see eg *Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711). There is no case comparable with the present. But that does not, in my judgment, mean that s 75 is to be restrictively applied only to monetary stipulations.

[47] The approach that a court should adopt when determining whether a given stipulation in a contract is a penalty was laid down in *PK Achuthan v State Bank of Travancore, Calicut* AIR 1975 Ker 47. Balakrishna Eradi J when delivering the judgment of the Full Bench said:

> The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty.

This test was approved by the Indian Supreme Court in *Subbarama Sastri v KS Raghavan* AIR 1987 SC 1257.

[48] Adopting this approach to the facts of this case, I do not think that the cl 8 formula is a penalty. To be a penalty it must hold the other contracting party in terrorem. In other words it must be extortionate. So, a clause in a contract for the sale and purchase of property that enables the vendor to forfeit a non-extortionate deposit is not a penalty and does not come within s 75. See *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, where Lord Hailsham said that 'there is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land'.

[49] In my judgment, there is nothing extortionate about the cl 8 formula. It is not, objectively speaking, directed at ensuring that the defendant performs its obligation under any contract it had with DBKL. It merely comes into operation upon the happening of a contingency, namely, the mutual termination of the first concession agreement. That event did happen and as a result the formula has to be used to calculate the losses suffered by the plaintiff.

[50] There is another reason why s 75 does not apply to the facts of this case. Section 75 is concerned with the question whether a sum named in a contract or a stipulation in a contract is a genuine pre-estimate of the damages that the innocent party may suffer in the event of a breach. It has no application to an action for a simple debt, although it does apply to extortionate claims of interest on a debt. In my judgment, cl 8 creates a debt in the plaintiff's favour. Authority for the view I take is to be found in a case referred to us by learned counsel for the plaintiff during argument. It is *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 where it was held at all levels, including the House of Lords, as follows:

> A provision in a contract providing for the payment of money by one party on the occurrence of a specified event, rather than on breach of a contractual duty owed by that party, could not be a penalty because the doctrine relating to the unenforceability of penalties was confined to payments which were agreed in advance to be made in respect of, but which were not a genuine pre-estimate of the damage arising from, a breach of obligation by one party.

Export Credits was applied by the English Court of Appeal in *Coneco Ltd v Foxboro Great Britain Ltd* [1992] (Unreported) where Sir Christopher Slade said that:

> the decision of the House of Lords in the *Export Credits Guarantee* case is, in my judgment, binding authority for the proposition that, at least in the case of a contract of a commercial nature, a clause cannot be regarded as a penalty clause if it provides for the payment of money on the happening of a specified event other than a breach of a contractual duty owed by the contemplated payer to the contemplated payee.

[51] So too here. We have before us a commercial contract. And, as I have already said, the defendant's liability to the plaintiff was contingent upon the first concession agreement being mutually terminated. That event having happened, what the plaintiff was entitled to recover from the defendant were not damages but was a debt.

[52] It may well have been different if cl 8 had said that if the defendant cancelled or caused the cancellation of the first concession agreement it would have to pay an exorbitant sum of money to the plaintiff. In such circumstances it would have been open to the defendant to argue that no matter what DBKL did or did not do, the penalty would have required the defendant to perform the first concession agreement, that is, it held the defendant *in terrorem* to perform. But that is not the case here.

[53] I am therefore in agreement with the submission of learned counsel for the plaintiff that s 75 does not apply to the plaintiff's cl 8 claim. There is another aspect about the cl 8 claim. It appears clear that the compensation calculated on the basis of the cl 8 formula comes to RM65,182,920. This was to come from monies paid to the defendant by DBKL and the Federal Government amounting to a sum in excess of RM700m. In fact the documentary evidence shows that the defendant had expressly included the sum of RM65,182,920 in the sum receivable by it. This is reflected in part of the contemporary correspondence to which we were referred during argument. Learned counsel for the defendant made a valiant attempt to distance the defendant from the document in which the RM65,182,920 is mentioned by suggesting that that document did not emanate from the defendant.

However, after reading the relevant documents I find that there is no merit in that argument. In my view, the defendant's belated suggestion that the document in question did not come from it is disingenuous — a desperate attempt to clutch at straws.

[54] As I have already said, the cl 8 claim is in truth an action to recover a debt owed by the defendant to the plaintiff. That debt is the sum of RM65,182,920 arrived at in accordance with the cl 8 formula. Based on what I have said thus far, I would allow the plaintiff's claim under this head and enter judgment in its favour for the aforesaid sum.

THE THIRD ISSUE: THE CLAUSE 9 CLAIM

[55] Clauses 9.4 and 9.5 of the restructure sale agreement provide as follows:

> 9.4 The Vendor shall fully sub-contract all Future Contracts to the Purchaser immediately upon entry into such contracts.
>
> 9.5 Any profits, moneys or other benefits received by the Vendor, from the Closing Date, in respect of the Contracts or the Future Contracts shall be held by the Vendor on trust for the Purchaser and all such moneys shall be placed in the Trust Account in accordance with Clause 10.

[56] There are two points that arise out of this head of the plaintiff's claim. The first concerns the grounds on which the learned judge rejected it, namely that it is flawed by uncertainty and by the want of consideration. Second, there is the reason advanced by the defendant, in addition to those given by the judge, namely, that the basis for the claim simply does not exist. I will deal with the latter first. But, some background is necessary.

[57] This part of the plaintiff's claim is directed at the second concession agreement. It is the plaintiff's case that the second concession agreement is a 'future contract' within cl 9.4. The restructure sale agreement in cl 1.1 defines 'future contract' as any contract relating to any project or the construction of any works entered into or to be entered into with the Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement.

[58] Much time and effort has been spent in oral and written argument on the learned judge's finding that cl 9.4 was void for uncertainty *as a matter of contract* by virtue of s 30 of the Contracts Act 1950. With respect, I think that the target has once again been missed. Look at cl 9.5 again and see what it actually does. It creates an express trust. The actual words it uses are 'the future contracts *shall be held* by the vendor *on trust* for the purchaser (Emphasis added). Once an express trust is created, there is no role for the law of contract. The real question or target that ought to have been addressed in the submissions of counsel before the High Court should have been whether the trust created under c 9.5 is certain. And upon that question s 30 which only applies to contracts has no relevance whatsoever.

[59] The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v Knight* (1840) 49 ER 68. There it was held that for a trust to be certain three requirements must be fulfilled. First, there must be certainty of intention. Second there must be certainty of subject matter: both in terms of the corpus and the beneficial interest. Third, there must be certainty of the objects of the trust. A trust is void if there is uncertainty in any of these three elements.

[60] In my judgment, on the facts of the present case the first and third requirements are amply satisfied. Let me take the first requirement. The words 'shall be held by the vendor on trust for the purchaser' are imperative, not precatory. They establish beyond a reasonable doubt an intention on the part of the defendant (described as 'the vendor' in cl 9.5) that it shall be constituted a trustee for the plaintiff (see *Hameeda Bee v Mrs P Seenivasagam* [1950] MLJ 267).

[61] Not very long ago this court had to consider the very same question in*ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 where we said this:

> That brings us to the paramount question within the first point. Was there an intention on the part of Henz and the plaintiff to create a trust for the defendant? Mr Davidson submitted that there was such intention. Having given the matter our utmost consideration, we are convinced that he is right. The language of cl 27.1 is very clear. Look at the words the clause employs. It says 'Sub-Contractor will receive the payments made by Contractor and will hold the right to receive such payments as a trust fund…' These are imperative words. They are not mere words of hope, desire, confidence or entreaty, ie, they are not precatory words. It is settled that no particular form of words are necessary to create an express trust. But where, as here, parties to a transaction use imperative words, they must be taken to have intended to create the relationship of trustee and beneficiary.

It is noteworthy that the language employed in the present instance in cl 9.5 of the restructure sale agreement is much stronger than that used in the ESPL case.

[62] The fact that the trust in this case was created by way of a clause in a contract between parties does not make any difference. It is still a trust. The case of *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 provides a good illustration of a trust created by a contract. In that case, the plaintiff airline appointed one Borneo Leisure Travel Sdn Bhd ('BLT') to act, in various places in Sabah and Sarawak, as its general travel agent for the sale of passenger and cargo transportation. The terms of the appointment were set out in a written agreement of 1 April 1986. The defendant was not a party to the agreement but had signed it on BLT's behalf. Among other things, the agreement provided that:

> All moneys collected by the agent for transportation and ancillary services sold under this agreement, including applicable commissions which the agent is entitled to claim thereunder, shall be the property of the carrier and *shall be held by the agent in trust for the carrier* or on behalf of the carrier until satisfactorily accounted for to the carrier and settlement made... Unless otherwise instructed by the carrier the agent shall be entitled to deduct from remittances the applicable commission to which it is entitled hereunder. (Emphasis added.)

It was accepted at all levels that the words appearing in the contract and to which I have lent emphasis created an express trust.

[63] As for the third requirement, there is no doubt whatsoever of the identity of the object of the trust. It is the plaintiff. So the third requirement is satisfied. And that brings me to the second requirement, namely, that of certainty of the subject matter. As I have already said there are two separate dimensions to this requirement. There must be certainty of the corpus, that is to say, the trust property. There must also be certainty of the quantum of the beneficial interest. The latter presents no difficulty because the plaintiff is the sole and absolute beneficiary under the trust. It is the former that calls for some discussion.

[64] Generally speaking, a trust may be void for uncertainty of trust property on one or more of the following four grounds:

(i) The instrument creating the trust may fail to identify or clearly define the property that is to form the subject matter of the trust. So, in *Palmer v Simmonds* (1854) 61 ER 704, a gift by a testator of 'the bulk of my said residuary estate' failed for uncertainty because there was no clearly defined or specific property to which the trust could attach. The word 'bulk' gave no sufficient indication as to the trust property.

(ii) It may be impossible to identify the trust property. So in *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350, a builder entered into a contract with his employer under which the latter was entitled to retain 3% of the contract price as trustee for the builder. This was to ensure that the work was satisfactorily done. The employer however failed to establish any retention fund of specific money due under the contract. Later, the employer became insolvent. A question arose as to whether a trust of the retention money had been successfully created. It was held that there was no trust because it was impossible to identify any specific money as subject to the trust obligation.

(iii) The trust property may be unappropriated or unallocated or properly segregated and therefore unascertained. The leading case on the point is *In re London Wine Co (Shippers) Ltd* [1986] PCC 121 which was cited with approval by Lord Mustill when delivering the Advice of the Privy Council in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74. In that case, a wine merchant held large stocks of wine in various warehouses. When a customer ordered a consignment, it was intended that the bottles ordered should become the property of the customer and that from that moment they would be held on trust for him by the company. However, the bottles that were ordered were not segregated from the general stocks until actual delivery to the customer. No customer was able to identify which of the bottles were his or hers. It was held by Oliver J that the intended express trust of wine in favour of customers whose orders had not yet been delivered failed for uncertainty.

(iv) The subject matter of the trust may be future property in the sense that it is property that the settlor does not own at the time of the creation of the trust but merely has a hope or expectation of receiving at some future date, for example, future royalties for a music composition (see *Re Trytel* [1952] 2 TLR

52). You cannot create a trust over property you do not own or over which you have no right. But a vested or contingent right to property at some future date is not future property. The holder of such a right has an immediate proprietary interest in the property in question and he may therefore subject it to an immediate trust.

[65] After very careful consideration of the terms of the restructure sale agreement, I have come to the conclusion that the trust created under cl 9.5 is not void for uncertainty. My reasons are these. In the first place, the subject matter of the trust is clearly identified by the restructure sale agreement itself. As I have already said, cl 1.1 clearly defines what a future contract is. At the risk of repetition, it says that 'future contract' means 'any contract relating to any project or the construction of any works entered into or to be entered into with the Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement'. So, if and when the defendant secures a contract with DBKL or any other person for a project, that contract is immediately charged with a trust. I cannot therefore see how much more clearly trust property may be identified. In the second place, the defendant had a contingent, and I would venture to even say a vested, right to secure a contract with DBKL in the form of the second concession. That much is clear from the contemporaneous documents and from the circumstances which I have already adumbrated. Third and last, unlike *Mac-Jordan Construction*, here a specific trust account was to be set up in a named bank at an identified address pursuant to cl 10 of the restructure sale agreement. For completeness let me reproduce that clause. It reads:

> 10.1 The Vendor shall on or before completion of the Sale of Assets, open an account with Malayan Banking Bhd — Ampang Park Branch.
>
> 10.2 Any moneys received by the Vendor under Clauses 4, 9 and other sums received relating to the Assets shall be placed in the Trust Account in accordance with the directions received from the Purchaser from time to time.
>
> 10.3 The Vendor shall apply such moneys held in Trust Account in accordance with the directions received from the Purchaser from time to time.

[66] It follows that the defendant, as a trustee was under a duty to open and maintain a trust account and pay into it monies coming into its hands under the second concession agreement. If that did not happen, the defendant was clearly in breach of trust. And it can hardly lie in the defendant's mouth to now say that the trust is void for uncertainty either because no account was established or, if established, no monies were paid in.

[67] Based on what I have said thus far, the second concession agreement is clearly trust property. The defendant is the trustee of that property for the plaintiff and must therefore account to the plaintiff for monies received by it under the second concession. In view of the conclusion I have reached I find it unnecessary to deal with the wider issue as to whether other profitable contracts apart from the second concession received by the defendant should be accounted for. It is not res integra in this appeal because all that the plaintiff is asking for is a finding that the second

concession agreement is trust property and comes within clause 9.5. As I have already said, that is a finding that the plaintiff manifestly is entitled to have made in its favour.

[68] I must now say a word about the learned judge's finding about the inadequacy of consideration. With respect, I find myself unable to agree with the learned judge that there was no consideration here for the future contracts. Firstly, there are set out in the restructure sale agreement the exchange of promises forming the foundation upon which that agreement rests. This exchange of promises is sufficient consideration. Very respectfully, the approach taken by the learned judge is rather narrow and technical. Even on the basis that this is a claim in contract the plea of want of consideration must fail. On the much firmer ground that there is a valid, binding and enforceable express trust it is trite law that in the case of a completely constituted trust — and this is such a trust — it may be enforced by a beneficiary whether he has given consideration or not. It is only an incompletely constituted trust that a volunteer, that is to say, one who has given no consideration cannot enforce(see *Milroy v Lord* (1862) 45 ER 1185. This is central to the law of trusts.

THE FOURTH ISSUE: THE SIGNAGE RIGHTS

[69] This part of the case relates to what are termed signage rights. In the light of my conclusions I really find it unnecessary to deal with this part of the case. It is a point raised by the defendant at the trial of the action.

[70] As commonly understood and in the present context, a signage right is the right which a person has over immovable property (not necessarily his or her own) to permit others to display advertisements on that property. It could be a building or a free standing pole erected on the property. The revenue collected from the advertisers goes to the person for the time being having the possessory right to the property. This is the kind of right that the plaintiff asserts it had over the area of land covered by the first concession agreement.

[71] The plaintiff's case is that these signage rights formed part of the first concession agreement between DBKL and the defendant and passed from the defendant to the plaintiff under the restructure sale and purchase agreement. The defendant says that no such rights ever existed under the first concession agreement and there were therefore none to pass onto the plaintiff: *nemo dat quod non habet*.

[72] The defendant's arguments are completely devoid of any merit. Looking once again at the totality of the evidence, oral and documentary, it is a fair inference that the plaintiff and the defendant conducted themselves towards each other as though the plaintiff was entitled to the signage or advertisement rights. In its letter dated 15 June 1991 addressed to the Ministry of Works the defendant included a claim for RM63m. This sum represents the loss of the plaintiff's advertising rights. There is no quarrel about this. The defendant cannot now say that the restructure sale agreement means something else and does not include the signage rights.

[73] In *Pinsia Development Sdn Bhd v Hj Abdul Hadi bin Ahmad* [2005] 2 MLJ 32, this court held that:

> parties may by their subsequent conduct give a term in an agreement a particular meaning. See *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce Bank* [1982] 1 QB 84; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[74] That is the case here. By its subsequent conduct the defendant accepted that signage rights belonged to the plaintiff. It cannot turn round now and say something else.

CONCLUSION

[75] For the reasons already given I would dismiss the defendant's appeal and allow the plaintiff's appeal. The costs of both appeals must be borne by the defendant. The deposit in the plaintiff's appeal is to be refunded to it. The deposit in the defendant's appeal is to be paid out to the plaintiff to account of its taxed costs. Although there are two appeals and two bills must be separately presented and taxed, I would direct the taxing registrar of this court to allow the plaintiff to recover only one item of getting up.

[76] I would also make the following further orders on the plaintiff's appeal:

(i) judgment be entered in the plaintiff's favour and against the defendant in the sum of RM65,182,920;

(ii) interest on the aforesaid judgment at the rate of 4% from the date of the writ until today and thereafter at 8%;

(iii) there shall be an inquiry to be held before the registrar of the High Court into the sums received by the defendant from any source whatsoever under the second concession agreement less all such just and true expenses as the registrar may in accordance with law permit;

(iv) that the parties be at liberty to lead evidence before the registrar at the inquiry aforesaid;

(v) that the registrar shall after due inquiry certify the sum so received as aforesaid by the defendant;

(vi) that the sum so certified by the registrar together with interest thereon at the rate of 4%pa, simple interest with effect from the date of the writ shall be paid by the defendant to the plaintiff;

(vii) that the parties shall be generally at liberty to apply to the High Court in respect of any or all of the orders (iii) to (vi) above.

[77] My learned brother Hashim Yusoff JCA has seen this judgment in draft and has expressed his agreement with it.

Zulkefli Makinudin JCA:

[78] I have read the judgment in draft of my learned brother Gopal Sri Ram JCA and fully agree with the views expressed and all the orders made by his lordship on the said two appeals before us wherein one is by the plaintiff and the other is by the defendant.

[79] I would like to herein add by stating that the essential facts of this case need to be adequately set out for a full appreciation of the legal issues that are raised by both the plaintiff and the defendant in their respective appeals. The essential facts of the case and the appropriate findings made out from the oral and documentary evidence adduced by both the parties can be stated as follows:

(1) The plaintiff and the defendant were incorporated as family companies of which Dato' Fawziah and Puan Maimoon, her mother, were the sole shareholders and directors.

(2) The defendant was earlier known as Syarikat Teratai KG Sdn Bhd ('STKG'). It only changed its name to Metramac Corp Sdn Bhd ('Metramac') on 4 March 1991 after it was bought over by Metro Juara Sdn. Bhd. [The factor of the change in ownership is important because any reference to the defendant in relation to the events then and later, without appreciating the change in ownership would lead to a misunderstanding of the facts.]

(3) In July 1986 (well before the change in ownership) Dato' Fawziah, through her company STKG, bid in an open tender called for by City Hall of Kuala Lumpur or DBKL to design, construct, finance and operate the privatisation of certain roads in the KL area ('the concession area'). There were five other bidders including United Engineers Malaysia Berhad ('UEM').

(4) STKG had requested that the tender, if awarded, be made to a new company called KL Tolls Sdn Bhd incorporated for this purpose. STKG was at that time engaged in several other projects especially in the building of low cost flats in KL and Seremban and other civil engineering works.

(5) A separate company doing only the tender project was important because it was intended to raise funds for the project by inviting investors to invest as shareholders in the concession company. It was anticipated that they would not be interested in the other projects of the company, and would want to be assured that the capital is utilized only for the toll project.

(6) STKG was, as disclosed in the tender documents, being advised at that time by professional financial consultants, called Schroder, for the purposes of the bid and the proposed subsequent capitalization of the equity with new shareholders. However, the letter of intent dated 25 August 1987 from DBKL declared that the concession company had to be STKG as the bidder.

(7) In the event, STKG, and not KL Tolls Sdn Bhd, signed the first concession agreement dated 20 November 1987 with DBKL ('the first concession agreement').

(8) The material clause in the first concession agreement is the 'land rights' clause (see cl 4.2 read with definition of 'works' and cl 4.6) out of which arose the licensing agreement for signage rights in favour of STKG and later the present plaintiff.

(9) The signage rights refer to the advertising rights through signboards and billboards etc. along the concession roads to be built by STKG in the concession area.

(10) Soon after the signing of the first concession agreement, Dato' Fawziah forwarded a draft licence agreement over the signage rights by cover letter dated 23 November 1987 to DBKL which was duly assented to by DBKL by endorsement on the letter itself.

(11) The formal licence agreement between DBKL and STKG was signed on 31 January 1989 after the lands in the concession area have been identified. The licence was for the duration of the concession period.

(12) Meanwhile, upon signing the first concession agreement, Dato' Fawziah had also instructed STKG's financial consultants, Schroder, to prepare the proposals for inviting investors as new shareholders in STKG to capitalize the company for about RM65m and gear itself for financing the concession project through borrowings. It was a material part of the Schroder's proposal that:

(a) STKG was restructured to hive off all its non-concession businesses so that it became a one project company; and

(b) the toll collection would be assigned to the lenders as security for the loan of RM204m under the facilities agreement.

(13) On 31 March 1988, the restructure sale agreement was signed between STKG and the plaintiff for the purpose of making STKG solely a one project company. STKG hived off all its other businesses to the plaintiff. By a supplemental sale agreement dated 12 September 1988 the consideration payable by the plaintiff was described to also include servicing STKG's current loans and overdraft pending their discharge.

(14) The material terms of the said restructure sale agreement are as follows:

(a) clause 2.2 on advertising rights that was assigned to the plaintiff wef 31 March 1988.

(b) clauses 9.4 and 9.5 by which STKG undertook to hold on trust for the plaintiff any 'future contracts' entered into by it.

(15) Notwithstanding that both STKG and the plaintiff were, at the material time, family companies owned by Dato' Fawziah and Puan Maimoon as shareholders, due compliance by disclosures were made and approvals were obtained.

(16) When Schroder released their Information Memorandum to potential investors in September 1988, a full disclosure of the restructure sale agreement was made to the new shareholders. It was further accompanied by a statement by STKG's auditors M/s Peat Marwick dated 16 September 1988 confirming that the sale of all non toll assets and liabilities to the plaintiff was made to restructure STKG as a single project company.

(17) In December 1988, four institutions and an individual invested in STKG and brought in a capital sum of RM65m. They were American International Assurance Ltd, Bank Pembangunan, Tabung Haji, Mitsui Construction and one Madam Itjih Nursalim from Indonesia.

(18) STKG then for the first time ceased to be a family company with Dato' Fawziah and Puan Maimoon now becoming minority shareholders (at 20.3%). The new shareholders were collectively in the majority.

(19) A formal shareholders agreement was signed on 29 December 1988 between Dato' Fawziah, Puan Maimoon and the new shareholders. In the agreement, the new shareholders, who now held majority control, acknowledged the sale of the non-concession business' assets and liabilities of STKG to the plaintiff. [This is significant because the new owners of STKG had by this step endorsed the restructure sale agreement and its terms. Further, it meant as regards the present dispute that they recognized that the advertising rights and the rights to future contracts had been assigned to the plaintiff].

(20) Thereafter the Board of STKG in late January 1989 was recomposed with the majority of the Board being comprised of representatives of the new shareholders, and one of them, Dato' Hanafiah, representing Tabung Haji, became the Chairman of the Board replacing Dato' Fawziah. Dato Fawziah was appointed Managing Director because of her experience in securing the concession agreement and the concession project being the sole business of STKG.

(21) When the signage sub-licence agreement ('the signage agreement') came to be signed on 2 November 1990 between STKG and the plaintiff, it followed a line of authorization that began with the restructure sale agreement of 31 March 1988. This line of authorization may be tabulated as follows:

(a) clause 2.2. of the restructure sale agreement of 31 March 1988 that granted exclusive advertising rights to the plaintiff.

(b) the new shareholders were expressly notified by Schroder, the financial consultants, of the existence of the restructure sale agreement and its terms.

(c) the new shareholders-cum-owners in signing the shareholders agreement of 29 December 1988 expressly declared their knowledge of the restructure sale agreement and declared its terms 'as binding' on STKG.

(d) the Board of STKG passed the resolution of 10 January 1989 authorising the entry into a sub-licensing agreement with the plaintiff, which noted the declaration of interest by Dato' Fawziah and Puan Maimoon in the plaintiff.

(22) The signage agreement of 2 November 1990 was therefore based on the first concession agreement and the licensing agreement which initially dealt with the advertising rights, and later the restructure sale agreement by which the advertisements rights were passed from STKG to the plaintiff.

(23) On 5 November 1990, STKG notified DBKL of the assignment of the advertising rights to the plaintiff.

(24) The signage agreement by clause 8 provided for a compensation formula in the event the main concession agreement is terminated by either STKG or DBKL under rights given to each under the concession agreement. It should be noted that cl 16 of the first concession agreement provided for a compensation scheme that recognized cancellation of operating contracts under it which included advertisement contracts. It did not however recognize the eventuality where STKG and DBKL mutually agree to terminate the first concession agreement. In that event the plaintiff would receive no compensation for loss of the advertising rights.

(25) Clause 8 was amended by the amending signage agreement of 15 December 1990 by providing for the eventuality of mutual termination of the first concession agreement by STKG and DBKL.

(26) The resolution of 10 January 1989 by the Board of STKG had authorized Dato' Fawziah to enter into the sub-licence agreement on behalf of STKG with the plaintiff and further of any amending or supplemental agreement thereto.

(27) The resolution of 10 January 1989 was entirely consistent with the shareholders agreement dated 29 December 1988 where the new owners of STKG took the stand that they had no interest in the non-concession business of STKG and recognized that the plaintiff had absorbed the non-concession business of STKG including its liabilities, and that the grant of the advertising rights was part of the consideration thereof.

(28) The Board of STKG at its meeting on 8 February 1991 confirmed the signage agreement and the amending signage agreement with the plaintiff. There was full attendance at the Board Meeting which again noted the interest of Dato' Fawziah and Puan Maimoon in the plaintiff. Neither Dato' Fawziah nor Puan Maimoon had a majority on the Board. This Board Meeting was the last before the takeover by Metro Juara Sdn Bhd ('Metro Juara') who then became the new owners of STKG.

(29) The events leading to the Metro Juara takeover may be traced back to the Cheras toll incident of September 1990. On 12 September 1990 DBKL notified STKG to suspend toll collection at Cheras following a public demonstration protesting the imposition of tolls. [DBKL can be said then technically in breach of the concession agreement entitling STKG to terminate the agreement and claim compensation.]

(30) STKG (at this time already a restructured company with multiple shareholders) was in a dilemma because it could no longer service its borrowings from the toll collection as envisaged. Dato' Fawziah was asked by the Board of STKG to discuss the various options with DBKL and the

Government because of the critical position in which STKG was now placed on two fronts, the RM40m repayment yearly to the lenders which could not be serviced without the toll collection, and the RM65m investment made in STKG by the new shareholders which was now at risk.

(31) The various options, including compensation for termination, were proposed to DBKL as contained in STKG's letter of 8 October 1990 to DBKL. At the same time, STKG forwarded its computation for compensation on a termination basis under cl 16.2 of the first concession agreement. The compensation sum was estimated at RM764.2m. Included in that global sum was an itemized sum of RM78.5m for, inter alia, cancellation of the advertising contract.

(32) DBKL agreed in principle to the option that the concession agreement be terminated and compensation be paid although no figure was mentioned. Subsequent to this commitment, UEM then made a formal offer to STKG on 12 November 1990 and 24 November 1990 to buy over STKG from its present shareholders. The letter was signed by one Anuar Othman, who with one Dato' Halim, were the sole shareholders and directors of Metro Juara, a nominated UEM company. The offer was at RM97.5m and made no mention of the proposed termination of the concession agreement.

(33) Thus, as matters stood then, an offer was made to buy STKG for RM97.5m when it had in principle already lost its sole business of the concession agreement and carried a loan liability of RM204m which it was currently unable to service. Further, the investing shareholders faced a potential loss of their RM65m investment in STKG.

(34) It would appear it did not make business sense for Metro Juara to offer to pay RM97.5m for a company that had lost its only business. But it was explained by the fact that there was the commitment in principle by DBKL to compensate STKG for a sum which was estimated at RM764m. As events went an amount equivalent to this sum was indeed paid by DBKL to STKG (now called Metramac, after its takeover by the UEM-nominated Metro Juara) between August 1991 and February 1992.

(35) It became apparent, albeit later, that the Government had decided by then that UEM should take over the project by buying over STKG. The existing shareholders were all then under pressure to sell off their respective shares to UEM. The existing shareholders of STKG were also told by the then Finance Minister Tun Daim that the Government was not in the position to pay compensation to them. This is evidenced from the exchange of letters between Dato' Fawziah and Tun Daim (see the letter of 7 February 1995 from Dato' Fawziah at p 1511 of appeal record Vol 5 and the reply from Tun Daim dated 9 February 1995 at p 1078 of appeal record Vol 3).

(36) The scheme of takeover of the concession by UEM obviously contemplated a new concession agreement being signed with DBKL. Thus even before the sale agreement was signed (which was on 23 January 1991), Metro Juara wrote to DBKL on 14 January 1991 about recommencing toll collection and re-negotiating the concession agreement.

(37) The above factors, namely of the Government plan for UEM to takeover the concession; the prospect of immediately recommencing toll collection; the prospect of a new concession agreement; and, the commitment by DBKL to compensate STKG in principle, estimated at RM764m, explains why UEM/Metro Juara bought over STKG on short notice and without due diligence. It is ordinarily unusual to commit RM97.5m to purchase a company without due warranties and disclosures.

(38) The Metro Juara takeover was done through the share sale agreement signed on 23 January 1991. It was on an 'entire agreement' basis without due diligence and without warranties. On 4 March 1991, the new owners changed the name of STKG to Metramac Corp Sdn Bhd ('Metramac').

(39) Soon after on 15 June 1991, Metramac wrote to the Works Ministry to recommence certain 'priority works' under the first concession agreement and put forward certain general cost projections. In it, Metramac included a sum of RM63m as due to the plaintiff as 'termination charges'.

(40) On 30 August 1991, DBKL confirmed that it would pay the cost of RM312m for works done by STKG (now called Metramac). This follows the proposal first made by STKG in its letter of 8 October 1990 and confirmed by the DBKL.

(41) On 13 February 1991, the Government in conjunction with DBKL agreed to pay Metramac a sum of RM405m, described as a subsidy, to meet 'the cost to Metramac financing' the works under the new concession agreement. It should be noted that the subsidy proposal was first made by STKG in its proposal for compensation by its letter of 8 October 1990. On the same day, 13 February 1992, the second concession agreement was signed between DBKL and Metramac. On the same day again, ie 13 February 1992, the Works Ministry undertook to pay Metramac RM32.5m as 'payment for share premium' not 'previously taken into account'.

(42) In total, the payment to Metramac, by one description or the other, now totalled RM756,700,000. It is not payment under the second concession agreement. It must include the 'termination charges' of RM63m to the plaintiff put forward by Metramac itself.

(43) It is not mere coincidence that the sum of RM756,700,000 paid, or to be paid, to Metramac approximates the sum of RM764,000,000 claimed as compensation by STKG for termination of the first concession agreement.

(44) It is also not mere coincidence that Metramac had to mutually agree to the termination of the first concession agreement and receive in return a payment or pledge of payment totalling RM756,000,000.

(45) In short, STKG which was bought by Metro Juara for a mere RM97.5m was within a year paid or pledged to be paid to Metramac a sum of RM756.7m even before undertaking the works under the second concession agreement.

(46) In the wake of these changes, the new owners of STKG, as Metramac, have purported to rescind the signage agreement and the amendment agreement. Later they have also repudiated the restructure sale agreement of 31 March 1988.

[80] The legal issues arising from the above mentioned factual circumstances have been comprehensively dealt with by my learned brother Gopal Sri Ram JCA in his judgment. I would only like to deal with some of the points raised by learned counsel for the defendant in his submission at the hearing of the two appeals before us as follows.

[81] As regards the submission of the learned counsel for the defendant that the first concession agreement did not provide for advertising right and the parties had all along proceeded on the mistaken assumption it did, I find this is a belated argument and is an afterthought. It was taken for the first time after the suit was filed in 1995. It is without any basis. It is my finding that the signage right or advertising rights or licensing rights as variously called form part of the 'land rights' as defined in the first concession agreement. It is comprised in the definition of 'works' and forms part of the 'land rights' given in the said concession agreement. 'Land rights' are defined in clause 1.1 and referred to in cl 4.2 in relation to 'works' for each section and by cl 4.6 such land rights are to be licensed (hence the term 'licensing rights'). 'Works' are defined in cl 1.1 to include 'signs' under 'related facilities'.

[82] It is also to be noted that after the first concession agreement was awarded, STKG wrote to DBKL for a formal licensing agreement as evidenced by the letters dated 23 November 1987 and 4 December 1987 respectively and assented to by the Datuk Bandar (see pp 686 and 700 of appeal record Vol 3). A formal licensing agreement was signed with DBKL on 31 January 1989 after the lands in the concession area had been identified. The licensing agreement expressly refers to the concession agreement as the source. By the licensing agreement the concession area became 'the licensed premises' giving STKG the exclusive licence to do a number of things in the concession area such as erecting a building etc. By cl 4.4 of the licensing agreement the licensee is authorized to erect or exhibit any 'sign, advertisement, hoarding' etc. The defendant now argues that the word 'advertisement' should not be read in the commercial sense but restrictively in the non-commercial sense. I find this argument is with respect absurd because the licence agreement is a commercial document which authorized STKG to carry on commercial activities in the concession area where STKG is required to remove all signs and shops selling merchandise upon vacating the licensed premises. It presupposes that those activities could lawfully have been carried out in the concession area. It is my finding from November 1987 to February 1992 (when the first concession agreement was terminated) all three parties, ie plaintiff, defendant and DBKL conducted themselves on the basis that such advertising rights existed as part of the 'land rights' along the concession roads.

[83] It is also noted that cl 2.2 in the restructure sale agreement between plaintiff and STKG of 31 March 1988 dealt with the advertising rights which were vested by STKG to the plaintiff. Likewise the signage agreement of 2 November 1990 and the amended signage agreement of 15 December 1990 which provide the sums payable in the event of termination of the concession agreement, were premised on the existence of the advertising rights. Therefore it can be said that the defendant then was a party to all the above agreements recognizing that such advertising rights existed and vested in it. In fact the grant of the advertising rights had been contemplated by the parties even before the execution of the concession agreement (see the terms of the tender document formulated by STKG and DBKL's acceptance of STKG's proposal in recital D of the first concession agreement at pp 2158 and 2193 of appeal record Vol 7). I would like to state here that the understanding as to the existence of the advertising rights cannot change merely because its shareholders changed. It is a separate legal entity from its shareholders and bound by the contracts it had entered into. On this point I would agree with the submission of learned counsel for the plaintiff that it is too late for the defendant to set the clock back. The law is clear that if parties to a contract had construed a contract as operating in a particular way and acted on it, they are both bound by that meaning they had given to the contract (see the Court of Appeal decision in *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32).

[84] It should further be borne in mind that the grant of the advertising rights by STKG to the plaintiff under the restructure sale agreement was a consideration for the plaintiff assuming the liabilities of STKG in respect of the non toll collection business and to ensure that the concession business of STKG is segregated from the non toll business. The plaintiff had already undertaken and performed its obligations under the restructure sale agreement. The concession project was thereafter successfully financed and implemented. It generated huge profit to the defendant as well as to the shareholders of Metro Juara, the subsequent shareholders of the defendant. It is my view having benefited from the sale restructuring agreement it is therefore not open for the defendant to question the existence of the advertising rights. They are estopped from doing so.

[85] On the issue of the 'Future Contract' and the 'trust' point under the restructure sale agreement, I find that the learned counsel for the defendant has, with respect, avoided the sole issue that arose out of the 'future contracts' point namely, whether it is void for uncertainty under s 30 of the Contracts Act 1950. It must be noted that this was the only ground on which the learned trial judge declared cll 9.4 and 9.5 of the restructure sale agreement unenforceable. It was not on the trust ground that there could be no trust for future monies etc. Clause 10 of the restructure sale agreement merely requires STKG to open a trust account for money received from the on going non concession businesses that were taken over by the plaintiff and also for any profit, or money received from the future contracts. STKG immediately after the restructuring opened a trust account with MBB at Ampang Park Branch. This account was operating from 31 March 1988 till 10 December 1991 and had transactions for monies paid to STKG for on going projects on behalf of the plaintiff for the above period before it was closed by Metro Juara, the new shareholders. In my view at this stage all that we are required to determine is whether

the learned judge was correct in striking down cll 9.4 and 9.5 as being void for uncertainty. To my mind there is no ambiguity or uncertainty as to the meaning of 'Future Contract'. It was specifically defined in cl 1.1. of the restructure sale agreement to refer to projects or works 'other than such project or works … relating to the first concession agreement dated 20 November 1987'. It is clearly identifiable and thus valid and enforceable.

Defendant's appeal dismmised. Plaintiff's appeal allowed.

Reported by Sally Kee